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DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

## Simple international rights, global constitutionalism, and scholarly methods

A rejoinder to comments on “Beyond Human Rights”  
– part 1

ANNE PETERS — 1 February, 2016



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An unexpected, organized, serious, and multiple engagement with arguments put forward in a manuscript which has gained shape, has grown, was written and re-written, was shrunk, cut, re-arranged, and which haunted my nights over so many years, which was proof-read and re-read so many times (though without detecting a number of embarrassing typos) – such an engagement is surely the most precious gift any scholar can ever receive. I am honoured and happy about the initiative taken by the blog editors to discuss the book *Beyond Human Rights* whose revised and updated English version will appear (hopefully) in the spring with Cambridge University Press. The lucid questions and critique raised in the blog contributions made me reconsider some points. Besides, the discussion showed where and how possibly to continue on the path taken in the book, and this is of course encouraging.

### **Update in times of re-etatisation**

Since the finalization of the German edition of the book in 2013, the international political and legal system has been changing. The trend of “humanization” of international law may have slowed down or stopped, while State sovereignty seems to have become more important again. This may have to do with the recognition that strong and well-functioning States are needed to protect human rights, that basic “Westphalian” principles such as territorial integrity and the prohibition on the use of force have been violated and need to be re-emphasised, and that non-Western States and cultures which have their own views on the meaning of human rights are in economic and political terms on the rise.

The global political and economic constellation has changed with the rise of the BRIC States and a concomitant decline of

the United States and Europe. The question is whether and how this power shift affects the international legal system, and with this, the status of the individual in it. Was the phenomenon of “humanization” or “individualization” of international law only “a hallmark of the period of U.S. leadership” (William W. Burke-White) which spread an ostensibly typically US-American narcissistic rights culture? If this were the case, a reversal of the “individualization” of international law would seem likely, because the voices of non-Western States which have traditionally been more sceptical of the purported “individualization” have gained more salience. However, I submit in the forthcoming English text that political disappointment about the “failure” or “abuse” of Western interventions in the Middle East and mere assertions of a novel Statism are not able as such to destroy the global legal *acquis individuel*.

### **Global constitutionalism**

Some commentators linked the concept of international rights beyond (or “below” or short of) human rights to global constitutionalism. By global constitutionalism, I understand an ideology (an “-ism”) which reads parts of international as being grounded in some form of constitutionalist principles, notably the rule of law and human rights, and which suggests that international law can and even should be interpreted and progressively developed in the direction of greater respect for and realization of those principles.

In the forthcoming revised English Chapter 14 I spell this link out a bit more clearly than in the German text: “This study is based on the assumption that within the domain of international law, a constitution-like layer of norms has begun to crystallize and is being further developed. We refer

to this as a process of constitutionalization of international law. International constitutional law includes the structural norms that define membership in the constitutional community, provisions on institutions and their powers, provisions governing the creation of law and conflict resolution, as well as substantive guide lines and principles embodying values. Human rights belong to the layer of international constitutional law. The ‘ordinary’ individual rights do not belong to this layer, but rather (figuratively) to the layer of ordinary international law ‘below’ that layer. This distinction between two layers of norms in international law, namely international constitutional law on the one hand (including international human rights) and ‘ordinary’ international law on the other hand (including ‘ordinary’ individual rights), is still only rudimentary. So far, there are hardly any special law-making processes guaranteeing that international constitutional law would be more difficult to amend, thus implementing a hierarchy of norms within international law.”

The contribution of rights “below” human rights to a normative hierarchy within international law would be one link to global constitutionalism. Besides, *Beyond Human Rights* is a “constitutionalist” contribution to international law scholarship because it considers (as I write in Chapter 17), the new international legal status of the human being as “an expression of a normative individualism. The idea here is that politics and law ultimately should be guided and justified by the concerns of the people affected by them. That paradigm does not dispute that people live socially (i.e. in communities), that their identity is constituted in part by those communities, that people act jointly, and that they have and should have collective goals. These collective projects must, however, ultimately be measured by the

needs and interests of the people affected and are not an end in themselves. From that perspective, precisely this orientation toward the individual in (different, overlapping, changing) communities justifies international law as a whole.”

### **The power of persuasion: Zoran Oklopčič**

But fortunately, as Zoran Oklopčič observes, the analysis presented in *Beyond Human Rights* is not necessarily tied to global constitutionalism, but can also be “read as a standalone”. In his lucid comments on the overall structure of my argument, Zoran opines that only a “narrow subset” of “contemporary dignifiers of statism” could be „converted“ to cosmopolitanism by my book, namely the global bourgeois, or – worse even – only “neo-liberals”.

Of course, scholarship is not about conversion but about persuasion, deliberation, and argument – as Zoran later acknowledges when he urges us to “rethink the styles of engagement in international legal theory in general”. My style of argument in the book is doctrinal (tracing and reconstructing the ideas and legal concepts, and suggesting a new one), practical (identifying the relevant hard and soft law texts and statements), and theoretical (only a little bit).

I have no qualms with admitting that all this includes a normative dimension. The explanation is simply that a normative analysis of the law and of its applications is, firstly, to some extent inevitable, and secondly, even desirable. The first point is its inevitability: Because of the leeway inherent in any interpretation and application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a “normative” and not merely a

“positive” analysis. Although a normative analysis can ideal typically be distinguished from positive analysis (in which the law is “only” described, explained, and prognosticated), it is banal to admit that there is in reality a blurred intermediate zone. First, because “description” is in itself already a constructive and systematic performance, which is based on numerous distinctions and choices. The “observer” must choose the actors, the acts, the periods of examination, and he must interpret texts. In all this, the observer’s (“normative”) preconceptions pre-structure her “positive” description. The inevitable blurriness between positive and normative analysis does *not* mean that we should give up the distinction between both types of analysis as an *idée régulatrice* (we should not abandon it) – but that we should harbour no illusions about its sharpness.

The second and I think more important point is that a normative analysis of international law is, due to specific features of international law, both inevitable and desirable. Because of the typical indeterminacy and vagueness of treaty provisions and by a large number of unwritten norms much more doubt hovers over the existence of the *lex lata* than in domestic law, which is relatively fully and precisely codified in the form of codes, laws, and decrees. In addition, international law has evolved gradually, often out of soft law texts. The exact point of change from a pre-legal practice to a hard rule of international customary law can hardly be pinpointed. For these reasons, neither the canons of construction for treaty interpretation nor empirical research on the formation of customary law will in themselves yield clear results. The findings must be complemented by normative (evaluative) considerations. For example, it makes sense to qualify a practice and the accompanying *opinio iuris* as sufficiently general and enduring when the legal

norm identified thereby is overall in conformity with the international legal system and in harmony with other international legal principles.

I take the point that my analysis of the individual's legal status risks, as any conceptual proposal, to sell a scholarly idea (or an at best "emerging" norm) for law as it stands. Generally speaking, the "premature" labelling of barely discernible "norms" or concepts as valid law is in methodological terms flawed because it mixes (beyond what is inevitable) positive and normative analysis. Moreover, it risks undermining the normative power of international law as a whole. When a scholar wrongly asserts the existence of a legal norm, he or she usurps the position of a law-maker without normative justification.

However, an evaluative systematization and an evaluative closure of legal gaps is exactly what international legal scholarship is about – because of the inherent graduality of the international legal process and because of the indeterminacy of treaty law mentioned above. These typical features of international law prevent the purely "positive" analysis from generating clear and unequivocal results. And because States could then more or less choose that interpretation of the law which suits them best, any auto-limitation of scholars to "description" of the law and legal practice "as it stands" would make it even easier for States to disregard international law under cover of law. I submit that problems and perils of ideology can hardly be avoided by concentrating on seemingly value-free "positive" analysis, and this is why *Beyond Human Rights* does not even purport to do that.

## Democracy and reversibility of simple international rights: Michael Riegner

Michael Riegner applies the framework suggested in *Beyond Human Rights* to information rights. While the right to information (Art. 19(2) ICCPR) is widely recognized as a human right, its exact scope and reach is not fully clear. Some emanations such as the right of access to official documents (see the CoE Convention ETS No. 205 of 2009 [not in force] and the EU Transparency Regulation 149 of 2001) are regulated in administrative-law type norms. The “information architecture” is a perfect example not only for a mix of international, regional, and domestic law (thus forming a body of “global” or “transnational” law), but also for an interplay of human rights with ordinary or simple rights (and obligations) within international law.

Michael then links the idea of “simple” or “ordinary” rights to two concepts which play a part for international law more generally: Democracy and universality. He reminds us that *reversibility* is an important feature of democratic law. If simple rights were more easily amendable or withdrawable than human rights, then they were in some sense more democratic than entrenched human rights. At first sight, all rights enshrined in international treaties enjoy formally the same status and are equally difficult to amend. But while amendment and reform require unanimity, denunciation/abolishment can be realised unilaterally. Maybe the fact mentioned by Michael, namely that some Latin American States denounced their BITs (which – in my understanding – may endorse investors’ rights short of human rights) might show that they do not take those rights as seriously as human rights. On the other hand, even the membership in human rights treaties is, at least in the public



debate, no longer considered to be a political no-go. Trinidad and Tobago had once withdrawn from FP 1 to the ICCPR, in order to accede again with a reservation, and that withdrawal from the ECHR is currently discussed in the UK and Switzerland. It remains to be seen whether denunciation action will follow, which would constitute a grave attack on the “sanctity” of human rights, would put into perspective my claim of a distinction in weight, and would furnish material for reflection on Michael’s idea of democratic reversibility of rights.

In the context of reflection on democracy, Zoran’s second observation is relevant, too. Zoran notes that *Beyond Human Rights* contains only quite limited sections on political rights, political participation, and on the barely existing law-making role of individuals (including their role as a global *pouvoir constituant*) in the current global system. Indeed, this whole dimension would warrant another book. For these matters, all depends, according to Zoran, on one’s “vision” of collective political action, seen in the context of economy and culture. Obviously, the enormous economic and cultural differences between communities or potential political collective actors makes global constitution-making and global constitutional amendment hard not only to realize but already difficult to conceptualize. So let’s wait for his book on this question.

Besides democracy, the second point made in Michael’s contribution is the link between “simple” international rights and the debate on the universality of international law. I share his and Sundhya Pahuja’s understanding of “universalism”. Obviously, international law does not embody apriorical and eternal truths. On the other hand, it is reductionist to consider the universalist claim of

international norms solely and always as a camouflage for the pursuit of national interests of the powerful players. “Hegemony” is no passe-partout which could explain or “unmask” the essence of the entire international legal order.

International law is, I would say, universal only *when and as long as* some of its principles can be based on an overlapping consensus by real persons across the globe, when it furnishes procedures to reconcile conflicting interests arising over global goods, territory, etc., and when it offers legal institutions which seek to contain damage to persons who live in the face of irresolvable conflicts. International law has, as Riegner says, a “negotiable content” – and the inevitable social fact is that bargaining power matters a lot in the negotiation of that contents. International law is not universal, but its formats and substance are in a constant and fluctuating process of aspiring at, acquiring, and losing universality due to contestation and violence. What matters is international law’s *universalizability*. The downgrading of some rights might, it is submitted, contribute to this objective.

*This rejoinder will be continued in our next post.*

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